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CASES CITED.

Argued by

SAMUEL H. HOFSTADTER.

Supreme Court of the United States

OCTOBER TERM, 1924.

HYGRADE PROVISION CO., INC., E. GREENBAUM CO., INC., and GUCKENHEIMER & HESS, INC., *Appellants,* *against* CARL SHERMAN, as Attorney General of the State of New York, and JOAB H. BANTON, as District Attorney of the County of New York, *Appellees.*	No. 104.
LEWIS & FOX COMPANY, *Appellant,* *against* THE SAME, *Appellees.*	No. 105.
HARRY SATZ, *Appellant,* *against* THE SAME, *Appellees.*	No. 106.

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, APPELLEE.

Statement.

These are bills in equity brought by the five complainants above named against the Attorney General of the State of New York and the District Attorney of the County of New York to enjoin the enforcement of certain statutes of the State of New York designed to prevent frauds in the sale of food products as kosher. The complainants moved for a temporary injunction under Section 266 of the Judicial Code before a statutory district court of three judges. The defendants made cross-motions to dismiss the bills.

The District Court unanimously denied the motions for an injunction and granted the motions to dismiss, in an opinion printed at pages 28 to 33 of the record in No. 403.

It is noteworthy that although all the complainants insist that their business is being irreparably damaged by the statutes in question, the present suits were instituted eight months after the statutes were enacted and over four months after they took effect; and although the opinion of the District Court denying a preliminary injunction and dismissing the bills was handed down March 22nd, 1923, these cases have not been brought on in this Court until now, over a year and a half after the decision by the District Court, and nearly two years after the bringing of the bills.

Counsel for the appellants are in error in stating that the allegations of the bills are uncontroverted. As a matter of pleading, this may be true, but it is certainly not true as far as regards the motions for preliminary injunctions. Upon these motions answering affidavits were submitted controverting the essential allegations of the bills.

History of the Statutes Involved.

By Chapter 233 of the Laws of 1915, the Legislature of the State of New York added to Section 435 of the Penal Law, which is entitled "False labels and misrepresentations in the sale of food products," a new subdivision "4" which, together with the introductory phrase and concluding phrase of the entire section, reads as follows:

> "A person, who, with intent to defraud:
>
> * * * * * *
>
> 4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'Kosher' in any language,
>
> Is guilty of a misdemeanor."

It has been held by the highest Court of New York that the introductory phrase, "A person, who, *with intent to defraud,*" is intended to apply to the entire section, and hence to this subdivision of it (*People* v. *Atlas,* 183 App. Div., 595, 598, affirmed, 230 N. Y., 629).

The constitutionality of this subdivision was challenged by a defendant in a prosecution instituted under it in the State Courts, but it was sustained by the Appellate Division and the Court of Appeals (*People* v. *Atlas, supra*).

By Chapter 581 of the Laws of 1922, this subdivision was further amended to read as follows:

"A person, who, with intent to defraud:

* * * * * *

4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat products who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be,

Is guilty of a misdemeanor."

The Court will note that the amended subdivision, down to the words "in any language," is identical, word for word, with the original subdivision, the amendment consisting of the addition of the subsequent words. The Court will also observe that the general provision of Section 435, limiting the operation of that section to persons who do the various acts prohibited "with intent to defraud," is applicable to this amended subdivision, which is still a part of that section.

At the same time the Legislature also enacted Chapter 580 of the Laws of 1922, inserting a new Section "435-a" of the Penal Law, reading as follows:

> "SALE OF KOSHER MEAT AND MEAT PREPARATIONS. A person, who, *with intent to defraud,* sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any langauge; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising in block letters at least four inches in height, 'kosher and non-kosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor."

The differences between Chapter 580 and Chapter 581 are purely verbal and of no substantial importance, so that the Court may confine its attention to either of these statutes. Chapter 580, as

well as Section 435 of the Penal Law as amended by Chapter 581, begins with the limiting phrase:

"A person, who, with intent to defraud."

We shall have occasion later to refer to the extended argument of the learned counsel for the appellants that the statutes differ in that one of them requires an intent to defraud while the other does not. For the present it will suffice to remark that both of the prosecuting officers of the State of New York whose threats the complainants fear interpret both statutes as punishing only conduct with an intent to defraud, and that the District Court unanimously concur in this interpretation (*Record, fol.* 69 *).

The occasion for the 1922 amendments was as follows: It is usual for retail dealers in kosher meats to have a sign on the windows of their shops indicating that kosher meats are sold there. From these signs, the public naturally infers that only kosher products are sold in the shops the windows of which bear such signs. In *People* v. *Goldberger*, 168 N. Y. Supp., 578, however, the Court of Special Sessions of the City and County of New York held that such a sign was not, under the terms of the statute as it then existed, a representation that *all* the meat sold in the shop was kosher; and that consequently a conviction could not be had under the then existing law without a showing that the dealer had made a representation with respect to

* The three cases were argued together. With minor variations the records are identical. Unless otherwise indicated, all references will be made to the record in No. 403.

the specific piece of meat shown not to be kosher. It was to remedy this situation, and to prevent the actual deception of purchasers which would as a practical matter be immune from punishment under the *Goldberger* case, that the 1922 amendments were enacted. Their effect is to continue the prohibition against selling as kosher any food product which is not kosher, with intent to defraud, and to add a prohibition against the sale of both kosher and nonkosher meat preparations in the same shop, with intent to defraud, and without indicating by an appropriate sign that both kosher and non-kosher products are dealt in, and labelling each article sold or exposed for sale, "kosher" or "non-kosher," as the case may be.

The Opinion of the District Court.

The salient parts of the opinion below are as follows:

* * * * * *

> "The effect of these statutes is to continue the prohibition of selling, as kosher, any food product which is not kosher with intent to defraud and to add a prohibition against the sale of both kosher and non-kosher meat preparations in the same shop with intent to defraud when not indicating, by an appropriate and described sign, that both kosher and non-kosher products are dealt in, anl labeling each article sold or exposed for sale. * * *
>
> "It is evident from a reading of these statutes that it was the intention of the New York Legislature to specifically make an intent to defraud an essential element of the offense created. It was to prevent fraud and imposition in the sale of meat for the

orthodox Hebrew religious population that the legislation in question was enacted. The State legislatures have long been held competent to enact laws intended to prevent fraud and imposition. A State statute requiring all compound syrups to be labeled conspicuously with the percentage of each ingredient, naming the preponderating ingredient first, is one for the prevention of adulteration and fraud, and the manufacturer has no constitutional right to sell goods without giving to the purchaser such fair information as commanded by that statute. (Corn Products Refining Co. v. Eddy, 249 U. S. 427.) A statute which prohibits the sale of ice cream containing less than a specified percentage of butter fat, although the product sold was concededly wholesome, is a law designed to prevent persons from being misled to the weight, measure, quality or ingredients of the article of general consumption, and it is within the police power of the State to so legislate. (Hutchison Ice Cream Co. v. Iowa, 242 U. S. 153.) A statute requiring lard to be labeled 'black lard' or 'intestinal lard' so as to prevent the public from being misled as to the quality purchased, is not in violation of the rights of the State legislature. (Armour v. North Dakota, 240 U. S. 510.) Where the evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, which is deemed a matter of great importance to the State, and where its terms are directed to that end, they are not unreasonable. (Savage v. Jones, 225 U. S. 501.)

"The complainants urge that they have built up a large and profitable business in the sale of kosher meat products. Their business, as they have created it, must of

necessity be on the faith of their customers, orthodox Hebrews, to whom kosher meat is well known and understood. The meat products become desirable to them only when prepared, cured and sold under the method of their religious training. Complainants say they have long sold kosher meat products and it must be that the term 'kosher' has long been understood by them. The authorities of Hebraic law may differ as to what should be done in the slaughtering and curing of these meat products. The variation of opinion as to what acts are to be performed and what conduct is to be followed in preparing and caring for kosher meat, will not render the statute uncertain or vague. (United States v. Standard Brewery, 251 U. S. 210; Hamilton v. Kentucky Distilleries, 251 U. S. 146.)

"But under the statute, there must appear, in order to convict of the crime, an act and intent to defraud, and because of this there can be no such indefiniteness as to violate the guaranty by the Fourteenth Amendment of due process of law. (Omaechevarria v. Idaho, 246 U. S. 343.) In Heath & Milligan Co. v. Worst (207 U. S. 338), the Supreme Court considered a penal statute of North Dakota prohibiting the sale or exposure for sale of any paint containing any ingredient other than pure linseed oil, pure carbonate of lead, oxide of zinc, turpentine, Japan dryer and pure colors, unless the paint was properly labeled with a label showing the percentage of each ingredient not specified and the name and residence of the manufacturer. It was there said, where the objection of indefiniteness and vagueness was presented in the use of the phrase 'pure colors':

'We regard these criticisms answered by our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. It must not be forgotten, however, that inaccuracies of definition may be removed in the administration of the law. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition.'

"Nor do we think that the statute affects interstate commerce so as to be an unwarranted interference thereof. The burden of the statute is to prevent fraud and imposition in the sale of kosher meats, which the legislature of the State in its wisdom thought to require protection. In no sense is it aimed at interstate commerce. It does not discriminate against interstate commerce. It promotes honest dealing by merchants dealing in kosher meat. While the State cannot, under the claim of exerting its police powers, undertake what is essentially a regulation of interstate commerce, or impose a direct burden upon that commerce, still when the local regulation has a real relation to the suitable protection to the people of the State, and is reasonable

in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by the Congress pursuant to its constitutional authority. (Savage v. Jones, 225 U. S. 501; Sligh v. Kirkwood, 237 U. S. 52; Amos Bird Co. v. Thompson, 274 Fed. 702.)

"Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Federal Constitution. Legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuits. (Plumley v. Mass., 155 U. S. 461.)

"The Court of Appeals of the State of New York has held that the use of the word 'kosher' used in the statute, is used in no indefinite sense, but by its ordinary meaning as such term is used in the trade. It is to designate meat as having been prepared under, and a product sanctioned by the orthodox Hebrew religious requirements, and thus the legislature has definitely defined the word 'kosher' as used in the statute. (People v. Atlas, 183 App. Div. 595; affd. 230 N. Y. 629.)

"We think that the attack made upon this statute must fail, and that the statute in no way is legislation in contravention of the Federal Constitution.

"The applications for preliminary injunctions are denied, and the motions to dismiss the complaints are granted."

POINT I.

The statutes in suit are designed to prevent fraud and misrepresentation, and are clearly within the police power of the State of New York.

In *People* v. *Atlas,* 183 App. Div., 595, affirmed 230 N. Y., 629, the Court said (p. 597), in sustaining the constitutionality of the original statute of 1915:

> "It needs no argument to show that it is competent for the Legislature within its general police power to enact legislation to prevent and punish fraud and imposition."

This statement is so amply supported by decisions of this Court that it would be pedantic to cite them all here. A reference to a few of the cases showing the wide latitude which this Court has given to the State police power, however, may be helpful.

In *Corn Products Refining Co.* v. *Eddy,* 249 U. S., 427, the Court had under consideration a Kansas statute requiring all compound syrups to be labelled conspicuously with the percentage of each ingredient, naming the preponderating ingredient first. The Court upheld the statute as one for the prevention of adulteration and fraud, saying at page 431:

> "It is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold."

In *Hutchinson Ice Cream Co.* v. *Iowa,* 242 U. S., 153, the Court upheld a statute prohibiting the sale of ice cream containing less than a specified percentage of butter fat, although the product sold by the plaintiff in error, which contained less than that percentage, was concededly wholesome, saying at page 159:

> "Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."

In *Armour* v. *North Dakota,* 240 U. S., 510, a State statute required lard to be put up in packages containing a specified number of pounds net weight or even multiples thereof, the purpose being to prevent the public from being misled as to the quantity purchased; and also provided that if the lard was other than leaf lard, it must be labelled "Black Lard" or "Intestinal Lard," as the case might be. The Court sustained the statute, saying at page 513:

> "We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws."

In *Savage* v. *Jones,* 225 U. S., 501, the Court had under consideration an Indiana statute requiring

everyone selling concentrated foodstuffs for animals to affix a tag or label plainly printed in the English language giving the number of net pounds, the name and place of business of the manufacturer, and a guaranteed analysis, before selling or offering any article for sale. It also required the manufacturer or dealer to file with the State Chemist a certificate stating his name, office address, brand dealt in and ingredients of the brand, and to affix to each package a stamp showing that the article had been duly registered with the State Chemist. The Court sustained the statute as a valid police regulation, saying, at page 524:

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable."

See also *Hebe Co.* v. *Shaw,* 248 U. S., 297 (sustaining statute prohibiting condensed milk made from skimmed milk); *Rast* v. *Van Deman & Lewis,* 240 U. S., 342 (sustaining statutory prohibition of trading stamps on the ground that they may be considered "by an appeal to cupidity a lure to improvidence" and as having "the seduction and evil" of a lottery); *Purity Extract Co.* v. *Lynch,* 226 U. S., 192 (sustaining a State statute prohibiting the sale of non-alcoholic malt liquors, on the ground that their sale might make more difficult the enforcement of the prohibition against intoxicating liquors); *Murphy* v. *California,* 225 U. S., 623 (sustaining a statute prohibiting billiard halls, on the ground that they may have a harmful tendency);

Otis v. *Parker,* 187 U. S., 606 (sustaining a statutory prohibition of the purchase or sale of stocks on margin, on the ground that it may lead to improvident speculation); *Booth* v. *Illinois,* 184 U. S., 425 (sustaining a statute prohibiting the sale of options for the future purchase of grain or other commodities, on the same ground).

As to the equal protection of the laws, see *Crescent Oil Co.* v. *Mississippi* (257 U. S., 129, 137); *Oliver Iron Co.* v. *Lord* (262 U. S., 172, 178); *Heisler* v. *Thomas Colliery Co.* (260 U. S., 245, 255).

Under the principle of these cases, and of many others decided by this Court, the statutes under attack are a plainly valid exercise of the police power of the State of New York.

Circuit Judge MAYER said, when serving as Attorney General of the State of New York, years before the statutes now in suit were ever thought of (*Opinions of New York Attorney General* [1906], pp. 454-456):

> "It is a matter of common knowledge that there are about 500,000 Orthodox Jews in the City of New York. These inhabitants of the City of New York adhere to the Mosaic rites in regard to the slaughtering of cattle. * * * A person of the Jewish religion thus observing these Orthodox Mosaic rites, would not buy or consume food from cattle killed in any other manner. The meat which is the result of such slaughtering is well known as 'kosher meat.'"

In this connection, it is of interest to note that as long ago as *1796,* and again in *1805,* the Common Council of the City of New York revoked the

licenses of two butchers, Nicholas Smart and Caleb Vandenburg, for affixing a kosher seal to meat that was not in fact kosher, and that in 1813 there was for a short time in force in the City of New York an ordinance prohibiting the sale of meat as kosher unless it was killed under license from a Jewish congregation of the City of New York (see "The Question of the Kosher Meat Supply in New York City in 1813, with a Sketch of Earlier Conditions," by Samuel Oppenheim; Publications of the American Jewish Historical Society No. 25, 1917). It is proper to consider historical practices of this sort in determining the constitutionality of a statute (*Ownby* v. *Morgan*, 256 U. S., 94, and see *Crane* v. *Hahlo*, 258 U. S., 142, 147).

Indeed, by the complainants' own showing, there is an extensive demand in the State of New York for kosher meat products. The hundreds of thousands of persons who desire kosher meat for their daily use are entitled to the assurance of good faith, which is all that the statutes exact, in the supplying of that demand.

Extensive hearings before the legislative committees prior to the enactment of both the original and the amendatory statutes, as well as the hearings held before Governor MILLER before his signature of the bills enacting into law the present statutes, have demonstrated the widespread misrepresentations and frauds committed by the purveyors of kosher meats and preparations on an unsuspecting public which, having paid a higher price than ordinary meats commanded, found that it had not received what it bargained for, and what in good faith it was entitled to receive. The public injured by these frauds is not necessarily restricted to any particu-

lar class of the population, for, as was pointed out in the opinion sustaining the constitutionality of the 1915 law (*People* v. *Atlas*, 183 App. Div., 595, 596-597, affirmed 230 N. Y., 629):

> "The statute does not limit the sale of such meat to orthodox Jews. The sale thereof is open to the public. The purpose of the statute, manifestly, is to prevent and punish fraud in the sale of meats or meat preparation, and it only operates on those who knowingly violate its provisions, for it is expressly provided that there must be both an intent to defraud and a false representation. * * * It may be that those principally interested in the subject-matter of the legislation are of the Jewish faith, but the benefits of the statute are not confined to them, for it is evident that others of the general public may be interested in knowing that greater care and cleanliness have been observed in the selection and slaughter of the animals the meat of which is so known, marked or labeled, than is otherwise exercised."

This legislation is justified in the public interest. It affects hundreds of thousands of citizens of this State who, following the firmly-rooted religious convictions of their ancestors from biblical times, regard the observance of the Jewish ritual requirements with respect to meat and meat products as a matter of conscience. Whatever violates these conscientious convictions, either by force or by fraud, is a matter of public interest and affects the well-being and good order of the State.

It is within the police power of the State to protect those who would be most cruelly deceived into the commission of what they believe to be sin, by

preventing such frauds. It is certainly as important to do so as it is to prevent fraud by selling silver marked as "sterling" when, in fact, it is not (New York Penal Law, Sec. 422); or by falsely marking articles "linen" (*id.*, Sec. 430); or by failing properly to label mattresses (*id.*, Sec. 444); or by misrepresenting the pedigree of animals (*id.*, Sec. 933); or by failing to label with a correct chemical analysis food for domestic animals (*Savage* v. *Jones*, 225 U. S., 501).

POINT II.

The statutes in suit do not unconstitutionally interfere with interstate commerce.

Complainant Satz carries on a general delicatessen and provision supply business in New York. He claims that he purchases a considerable portion of the meats in which he deals from packers outside of the State of New York, and that he resells them in their original packages.

Complainant Lewis & Fox Co. is a provision manufacturer in the State of Massachusetts. It alleges that a considerable part of its business consists in shipments into and through the State of New York.

Complainants Hygrade Provision Co., Inc., E. Greenbaum Co., Inc., and Guckenheimer & Hess, Inc., are engaged in the purchase, sale and preparation of meat within the State of New York. They allege that they ship a considerable proportion of their products into other States of the Union.

All the complainants contend that the statutes constitute an unconstitutional interference with interstate commerce.

We have seen under the last point that the statutes in question are intended and designed to protect the citizens of the State of New York against fraud in sales and transactions within the State, and that as such their constitutionality is amply sustained by the authorities. The cases are equally clear to the effect that valid police regulations of this sort will not be held unconstitutional even though they may incidentally affect interstate commerce.

In the cases of *Corn Products Refining Co.* v. *Eddy,* 249 U. S., 427, *Armour & Co.* v. *North Dakota,* 240 U. S., 510, and *Savage* v. *Jones,* 225 U. S., 501, all of which cases were cited under the preceding point, the statutes in question were attacked not only as a deprivation of property without due process of law, but also as an unwarranted interference with interstate commerce. In each of these cases this Court overruled the latter contention as well as the former, and held the statutes involved constitutional.

The leading case is *Savage* v. *Jones, supra,* in which Mr. Justice HUGHES, writing for the unanimous Court, said (pp. 524-525):

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but with out discrimination sought to promote fair dealing in the described articles of food.

> "The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Railroad Co.* v. *Husen*, 95 U. S. 465, 475; *Walling* v. *Michigan*, 116 U. S. 446; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Scott* v. *Donald*, 165 U. S. 58; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 13; *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218. *But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority.*"

In *Sligh* v. *Kirkwood*, 237 U. S., 52, the Court had under consideration a statute of Florida prohibiting the delivery for shipment of any citrus fruit which is immature or otherwise unfit for consumption.

The particular transaction for which the plaintiff in error was convicted by the State Court was a shipment in interstate commerce. This Court nevertheless sustained the conviction, saying at page 61:

> "It may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least

> until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation."

In *Amos Bird Co.* v. *Thompson,* 274 Fed., 702, the Court had under consideration a State statute requiring eggs imported from foreign countries to be labelled "foreign eggs" in letters at least two inches high, and restaurants using such eggs to have posted in a conspicuous place a sign in letters at least four inches high, "We use foreign eggs here." This statute was held to be a valid police regulation, and not in conflict with the power of the Federal Government over interstate commerce.

In *Silz* v. *Hesterberg,* 211 U. S., 31, this Court had under review a statute of the State of New York prohibiting the possession of game during the closed season. The plaintiff in error was convicted for having in his possession game imported from another State which had been acquired without any violation of the laws as to killing game. The Court sustained the conviction, holding that the statute might not be held unconstitutional merely because it incidentally affected interstate commerce.

Crossman v. *Lurman,* 192 U. S., 189, involved a statute of the State of New York prohibiting the

possession or sale within the State of New York of any adulterated article of food, and specifically defined as adulteration the coloring of any article of food so as to conceal damage or defect. The plaintiff in error sold the defendant in error 500 bags of coffee for shipment, by steamer, from Rio Janeiro to New York. Upon the arrival of the coffee in New York, the purchaser rejected it on the ground that certain beans had been colored to conceal a defect, and that hence the coffee was adulterated within the meaning of the New York statute. This Court, in a unanimous opinion by Mr. Justice WHITE, said (p. 197), quoting from the opinion in *Plumley* v. *Massachusetts,* 155 U. S., 461, 472:

> "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. *Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States.* For, as said by this court in *Sherlock* v. *Alling,* 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways,

> may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * *And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

See also *Oliver Iron Co.* v. *Lord* (262 U. S., 172, 178), holding that mining is subject to State regulation even though the products of the mine may be shipped by interstate commerce.

These cases incontrovertibly establish the proposition that incidental to the well-recognized power of the State to protect its citizens from deception and fraud at the hands of vendors, it may pass statutes requiring truthful labeling of food products, including those which are concededly wholesome, and that such statutes are not invalidated by the fact that they may incidentally affect interstate transactions. The statutes at bar are directly within the reasoning of these cases, and the objection urged that they interfere with interstate commerce must therefore fail.

POINT III.

The statutes at bar specifically require an intent to defraud. In any event, they are sufficiently definite to be easily understood and followed. The complainants have no standing to bring the present suits, and the bills of complaint are without equity.

We have pointed out in our analysis of the statutes (*supra*), that both of them specifically make intent to defraud an essential element of the offense created. Indeed, even if such intent were not expressly required, it would be implied (*Baender* v. *Barnett*, 255 U. S., 224; *Verona Central Cheese Co.* v. *Murtaugh*, 50 N. Y., 314).

Appellants devote a considerable part of their argument to the proposition that Section 435a of the Penal Law punishes acts done without any intent to defraud. The argument is based on a labored interpretation of the statute, which is rested solely upon the supposed effect of the punctuation of the statute. The argument is unsound in both of its premises.

In the first place, even as a purely verbal matter the punctuation of the statute does not support the construction put on it by the appellants. And in any event, punctuation is resorted to in the interpretation of statutes only when no other principle or rule of interpretation is applicable.

In the instant case we have two controlling rules of interpretation establishing the proposition that neither statute punishes acts done without an in-

tent to defraud. The first is that unless the legislative intent is clearly expressed to the contrary, a criminal statute will never be interpreted so as to punish innocent acts. The second is that in the absence of authoritative decisions of the State Court (and there are none in the case at bar), the Federal Courts will never interpret a State statute so as to render it unconstitutional or even so as to make its constitutionality doubtful, if this result can possibly be avoided by another interpretation of the statute.

Appellants' counsel would have this Court interpret Section 435a so as to punish innocent acts (and such an interpretation, it must be conceded, is, to say the least, a doubtful one) and then strike it down as unconstitutional because it punishes innocent acts. This, this Court has frequently had occasion to declare, is just what the Federal Courts will never do.

The decision in *Baender* v. *Barnett* is highly instructive. The offense for which the plaintiff in error was convicted in that case was the possession of dies in the similitude of those used by the United States Government for making coins. As originally enacted, the statute against the possession of such dies had specifically required an "intent to fraudulently or unlawfully use the same" as an element of the offense. *By an amendment passed prior to the offense for which the plaintiff in error was convicted, however, this express requirement was eliminated from the statute.* The plaintiff in error was indicted for "wilfully and knowingly," having in his possession such a die. He pleaded guilty, but sued out a writ of *habeas corpus,* upon the ground that the statute punished

the innocent possession of such a die, and hence was unconstitutional.

This Court unanimously sustained the conviction, saying at pages 225-226:

> *"The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts.* A citation of three will illustrate our view. In *Margate Pier Co.* v. *Hannam,* 3 B. & Ald. 266, 270, ABBOTT, C. J., quoting from Lord Coke, said: 'Acts of parliament * * * are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.' In *United States* v. *Kirby,* 7 Wall. 482, 486, this court said: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a

> fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." ' And in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401, we said: 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' "

The significance attached by this Court to the requirement of *mens rea* is further emphasized by the decision of this Court in *Omaechevarria* v. *Idaho,* 246 U. S., 343. In that case a State criminal statute was attacked on the ground of indefiniteness. The Court, after considering the objection of indefiniteness, said, at page 348:

> "Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness is removed by §6314 of Revised Codes, which provides that: 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

From the cases just cited it will be seen that the express requirement in the statute of a criminal intent absolutely disposes of the alleged objection to the statutes on the ground of indefiniteness. But there is another respect in which this statutory requirement disposes of the present suits. "It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is with-

in the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him" (BRANDEIS, J., writing for the unanimous Court in *Heald* v. *The District of Columbia,* 259 U. S., 114, 123; *accord, South Utah Mines* v. *Beaver Co.,* 262 U. S., 325, 331; *Rail & River Coal Co.* v. *Yaple,* 236 U. S., 338; *Hendrick* v. *Maryland,* 235 U. S., 610, 621; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S., 531, 544-545; *Southern Railway* v. *King,* 217 U. S., 524; and numerous other cases).

By their express terms, the statutes under attack penalize the doing of the acts prohibited only where they are done "with intent to defraud." The only persons who can possibly be injured by these statutes, therefore, and hence, the only persons who, under the cases just cited, have any standing to attack their constitutionality, are persons who do or purpose doing the acts prohibited with intent to defraud. Obviously, the complainants cannot bring themselves within that class; for if they alleged their own intent to defraud, they would be stating themselves out of court. Of course, they allege no such intent on their own part. On the contrary, they go to great lengths in their bills of complaint to make it clear that they have always acted and intend to continue acting in good faith. If it be true that they have always acted and still continue to act in good faith, such good faith will be a complete protection to them against any prosecutions for violation of the statute. The statute expressly requires a criminal intent. There is no allegation that the defendants intend or threaten to prosecute acts not within the statute

as it is written; the presumption is that as public officers they will do their duty and prosecute no acts which are not in contravention of the law (*Heath & Milligan Co.* v. *Worst,* 207 U. S., 338, 359); and if perchance in some isolated instance, a misguided official may prosecute an act which is not prohibited by the law, the parties may safely be left to the protection of the State Courts (*Fox* v. *Walsh,* 236 U. S., 273, 277).

If this argument seems to result in an absurdity, it is only because the appellants' position is in fact absurd. It is absurd because they are seeking equitable relief against a statute which punishes nothing except wilful fraud. And there is another kindred absurdity in the appellants' position. They allege and urge that they have built up a large and profitable business in the sale of kosher meat products. They claim a constitutional right to the undisturbed continuance of that business. The very cornerstone of that business is the belief on the part of the hundreds of thousands of people who patronize it that the word "kosher" has a meaning, and that meat products which are kosher are more desirable and valuable than those which are not kosher. Yet in the very same breath these appellants ask this Court to hold the statutes unconstitutional on the ground that the word kosher is so indefinite as to be unintelligible, and deny the constitutional competency of the Legislature to hold them to the exercise of good faith in making the representation, which they themselves voluntarily make in the furtherance of their own business, that the products sold by them are kosher.

The voluntary designation by the complainants of their products as kosher constitutes a double representation, first, that there is such a thing as a kosher meat product, and, second, that the products sold by the complainants under that designation are kosher meat products. They have no constitutional right to make these representations unless they are true. For the purposes of the present suits, therefore, the appellants are, by their own conduct and representation, estopped from asserting that the word kosher is indefinite or without intelligible meaning.

But if the question of indefiniteness were before the Court, its solution would not be difficult.

The Legislature of the State of New York, and Governor MILLER, after his many years of eminent and honored judicial labors, have considered the statute sufficiently definite to be enacted into law. The New York Courts have said (*People* v. *Atlas*, 183 App. Div., 595, 597; affirmed 230 N. Y., 595):

> "It is manifest, however, that the Legislature did not intend to use the word 'kosher' in an indefinite sense, but evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by said religious requirements, and, therefore, as I view it, the Legislature has itself definitely defined the word 'kosher' as used in the statute."

Circuit Judge MAYER, while serving as Attorney General of New York, said eighteen years ago that the meaning of the phrase "kosher meat" was "well known" (*Opinions of New York Attorney General* [1906], 454-456).

For more than thirty centuries millions of people in every generation have lived and died in the confident belief that there is an ascertainable difference between kosher meat products and non-kosher meat products. Nor has this been a mere belief. It has been a belief on the basis of which they regulated their daily lives, and for which, if need be, they were willing to die. The Legislature of the State of New York has said by its enactment that that belief was not without real basis. Is this Court to say that that belief is a mere illusion, and that the distinction that has been the very foundation of the daily lives of millions of people for thousands of years, and upon the basis of which millions of dollars of capital, including that of the complainants in these suits, have been invested, is without any basis in fact?

The detailed answering affidavits show that excepting in possible border-line cases it is easy to tell whether the requirements as to the slaughter and preparation of kosher meat have been complied with. See especially the affidavit of Moses Hyamson, Rabbi of the Congregation Orach Chaim (Path of Life) of the City of New York; member of the Faculty and Professor of Codes of the Jewish Theological Seminary of America; formerly Senior Judge of the Ecclesiastical Court of London for eleven years, and Acting Chief Rabbi of the British Empire for two years; author of the English Edition of the Collatio Mosaicarum et Romanarum Legum and of "The Oral Law," and LL. D., of London University, especially at folios 44 to 48.

The decisions of this Court show how baseless is the claim of the appellants here that the statutes are void for indefiniteness.

The Wartime Prohibition Law, as interpreted by this Court (*U. S.* v. *Standard Brewery,* 251 U. S., 210), prohibited the sale of intoxicating liquors. It is notorious that the definitions of intoxication by medical and scientific authorities are in hopeless conflict with one another; that a percentage of alcohol which is capable of producing certain toxic effects on one individual may have absolutely no such effects on another individual; and that the effect produced by the same liquor on the same individual may vary widely at different times according to his condition and the manner in which it is imbibed. In spite of these many real uncertainties, which left the fate of the defendant in each case to the opinion of a court and jury as to whether a particular percentage of alcohol rendered a liquor intoxicating, the statute was sustained by this Court (*Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S., 146).

Omaechevarria v. *Idaho,* 246 U. S., 343, involved a penal statute of Idaho prohibiting any person having charge of sheep to permit them to graze on a range previously occupied by cattle, adding this provision:

> "But the priority of possessory right between cattle and sheep owners to any such range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

The Court said, at page 348:

> "SECOND: It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a 'range' or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the act. *Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it.* Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434. Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness is removed by §6314 of Revised Codes, which provides that: 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.'"

In *Miller* v. *Strahl*, 239 U. S., 426, the Court passed on a criminal statute requiring that, in case of fire, a hotel-keeper give notice of the fire to all persons in the hotel, and "do all in his power" to save them from the fire. The statute was attacked as unconstitutional for failing to prescribe any fixed rule of conduct. The Court, however, held the statute sufficiently definite, and overruled the attack on its constitutionality.

Nash v. *U. S.*, 229 U. S., 373, was a prosecution under the Sherman Anti-Trust Law. That law having been held by this Court to prohibit only unreasonable restraint of trade, it was claimed that the statute was thereby rendered too indefinite to be a valid criminal enactment. The Court, however, through Mr. Justice HOLMES, held (p. 378) "that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Waters-Pierce Oil Co. v. *Texas,* 212 U. S., 86, involved a Texas statute prohibiting contracts "reasonably calculated" to fix and regulate prices, and which "tend" to accomplish those results. The acts were attacked as "so vague, indefinite and uncertain as to deprive them of their constitutionality." The Court overruled this attack, and sustained the constitutionality of the law.

A very striking authority on this point is *Heath & Milligan Co.* v. *Worst,* 207 U. S., 338. In that case, a penal statute of North Dakota prohibited the sale or exposure for sale of any paint containing any ingredient other than pure linseed oil, pure carbonate of lead, oxide of zinc, turpentine, Japan dryer, and pure colors, unless the paint was properly labeled with a label showing the percentage of each ingredient not specified and the name and residence of the manufacturer.

The statute was attacked as unreasonable and also upon the ground that there was no recognized or intelligible meaning of the term "pure colors." The Court said, pages 358-359:

> "The term 'pure colors,' it is alleged, is intended to refer to coloring material used by paint manufacturers in powdered form, and is known in the trade as 'dry colors'; that the term 'pure colors' neither has a def-

inite meaning nor is 'it capable of an exact- or even approximately exact definition'; that some dry colors are regarded as 'pure' and others 'impure' by individual manufacturers, but there is 'nothing approaching a consensus of opinion,' and 'no rational classification on the subject has ever been attempted.' The standard 'applied to dry colors is not purity but efficiency.'

"We regard these criticsims answered by our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. IT MUST NOT BE FORGOTTEN, HOWEVER, THAT INACCURACIES OF DEFINITION MAY BE REMOVED IN THE ADMINISTRATION OF THE LAW. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. *The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition.*"

See also *Sligh* v. *Kirkwood,* 237 U. S., 52, in which the Court sustained a Florida statute prohibiting the shipment of citrus fruit "unfit for consumption."

Numerous other analogous statutes, which have never been specifically ruled upon by this Court because their constitutionality has never been questioned, will readily occur.

Probably all of the States have statutes prohibiting the publication of obscene literature, and the Federal statutes prohibit the transportation of such literature in the mails. Notoriously, the question of what is obscene depends upon the varying standards of time and place, and judges and juries may differ widely as to what is an obscene book. Yet it has never occurred to anyone to question the constitutionality or validity of these statutes on the ground of uncertainty.

It is safe to say that at least a majority of the States of the Union have statutes prohibiting labor on the Sabbath excepting "works of necessity and charity." Obviously, the phrase "works of necessity and charity" may be given widely varying definitions. No one, however, has ever attacked the validity of the Sunday laws on this account.

The cases cited by counsel for the appellant on the question of indefiniteness are not in point.

The basis of the decision in the *Cohen Grocery* case, 255 U. S., 81, is that "the section forbids no specific or definite act" (p. 89), and that it establishes "no standard whatever" (p. 92). The Court laid a great deal of stress on the fact pointed out in Mr. Guthrie's brief, which is quoted at some length in the footnote of the opinion, that able District Judges, in actually attempting to apply the prohibition of the Lever Act against making any "unreasonable rate or charge" for necessaries of life, had reached widely variant conclusions as to what an unreasonable rate or charge made, some of them basing it on market price at the time of the sale, and some on cost price, etc.

It is hardly necessary to analyze in detail the various state court decisions cited by counsel for the appellants on this point, as this Court is certainly not bound on constitutional questions by the variant decisions of courts of the different States. It is worth while pointing out, however, that the case of *Ex parte Lockett* (179 Cal., 581), upon which counsel lays so much stress, is based upon a specific provision of Section 24 of Article IV of the Constitution of California, requiring all laws to be in the English language. No such provision appears in the Constitution of the State of New York or in the Constitution of the United States. *Ex parte Andrew Jackson* (45 Ark., 158) is cited for the proposition that a statute which provided that it was criminal "to leave a wife and child without the means of support" is unconstitutional for uncertainty. If the case cited so held, we venture to say that it would not be followed by this Court. However, a reference to the case shows that it does not hold any such proposition. At page 162, the Court said:

> "Is it a misdemeanor cognizable at law, to 'leave a wife and child without the means of support'? It is certainly a very unworthy thing to do and worthy of the greatest reprehension, unless justified by necessity. But if it be a crime it must be so at common law. *We have no statute making it such.*"

It has been faintly suggested that the statutes are open to criticism because their effect is to import into the Penal Law of New York a foreign body of law. Clearly this point is not well taken. In the same sense that the enforcement of this law requires taking cognizance of the fact of certain

ritual requirements, perhaps every statute or justiciable question before the Courts requires taking into account the facts of nature, science, art or even institutions. The Federal Courts devote considerable study and attention as bases for adjudications involving immense property rights to such questions as novelty, invention, utility and prior art in the law of patents and of copyright. It has recently been held in New York that a misrepresentation with regard to the law of another State constitutes an actionable fraud (*Bernhan Chemical & Metal Corp.* v. *Ship-A-Hoy,* 200 App. Div., 399, affirmed on this point, 234 N. Y., 563, 605), and this decision is in accordance with the weight of authority in the other States (*Travellers' Protective Association* v. *Smith,* 107 N. E., 283, 287; *Bethell* v. *Bethell,* 92 Ind., 318; *Schneider* v. *Schneider,* 125 Iowa, 1; *Windham* v. *French,* 151 Mass., 547; *Wood* v. *Roeder,* 50 Neb., 476). Statutes in New York and elsewhere declare criminal the obtaining of money or other property by fraud or false pretenses. Under the cases we have just cited, it follows that the obtaining of property by misrepresentation regarding the law of another State will be a crime. A prosecution for that crime would necessarily involve a ruling upon what the law of another State is. Could it be held that for that reason the statute against false pretenses is unconstitutional, or that its enforcement would be unconstitutional in such a case?

It cannot be seriously disputed that in the vast majority of cases it is not only possible but easy to tell whether a particular meat product is kosher

or not. Counsel for the appellants makes much of the supposed difficulty of telling in border-line cases whether a particular product is kosher or not. Of course, almost every statute, including criminal statutes, involves border-line cases, the correct decision of which may be difficult. The authorities we have cited show that the fact that a criminal statute involves such border-line cases does not render it unconstitutional. As a matter of fact, border-line cases in which it is difficult to tell whether a particular product is kosher or not, involve only a minute fraction of the whole number of cases (*Record, fol.* 55). It would be a complete answer to appellants' contention on this phase of the subject, to say that the Legislature might clearly require dealers voluntarily making representations to determine at their peril whether those representations are true or not, even in border-line cases. Indeed, if the contention of complainants' counsel that the term kosher is so indefinite that no intelligible meaning can be assigned to it were true, it would, under the authorities, be clearly competent for the Legislature to say that the use of the term inevitably leads to deception and fraud, and that therefore the exploitation of any food products under that designation is prohibited (*Hebe Co.* v. *Shaw, supra; Hutchinson Ice Cream Co.* v. *Iowa,* 242 U. S., 153; *Purity Extract Co.* v. *Lynch,* 226 U. S., 192; *Silz* v. *Hesterberg,* 211 U. S., 31). But in the statutes at bar, the Legislature has not found that the term is indefinite, but on the contrary has ruled that the term is sufficiently definite to penalize its misuse. And it has not even gone to the extent (to which, as we have seen, it might constitutionally have gone) of requiring representations as to the kosher or nonkosher quality of

meat to be true at the peril of the party making the representation. It has penalized misrepresentations only when they are made "with intent to defraud." If the complainants are genuinely at a loss to determine, in the rare border-line cases that may theoretically arise, whether a particular product is kosher or not, good faith will, under the express terms of the statute, completely protect them. Even if it were true that the statute were indefinite, this feature of it would absolutely dispose of any constitutional objection on the ground of indefiniteness (*Omaechevarria* v. *Idaho,* 246 U. S., 343).

POINT IV.

This Court should not exercise its discretion to strike down the statutes involved in the suits at bar.

We do not question the *jurisdiction* of this Court to entertain the present suits. But the suits are equitable ones. The complainants are invoking the discretion of the chancellor to invalidate the solemn act of the legislative branch of the State government. And there are many circumstances in the case at bar which emphasize the reluctance to grant a temporary injunction against the enforcement of a law on the statute books which this Court feels in every case.

The original law, only incidental changes in which were made by the 1922 amendments, has been on the statute books for nine years. It has been consistently enforced during that period, prosecutions have been instituted under it and convictions obtained, and at least one conviction has been

sustained by the highest Court of the State (*People* v. *Atlas, supra*). The State Courts in those cases have had no difficulty in interpreting and enforcing the statute. The amendments of 1922 were enacted eight months, and took effect over four months before the present suits were instituted. In view of these circumstances, the contention that the statutes irreparably injure the complainants' business can hardly be taken very seriously. Despite the claimed irreparable injury, complaints have taken over a year and a half after the handing down of the decision of the District Court to bring their bill in this Court on for hearing. They have survived the supposed irreparable injury too long to leave any possible ground for belief that the injury done to their business by the statutes was really irreparable.

If the State of New York had enacted a law PROHIBITING *the selling of any meat which was not kosher, there might conceivably be something in complainants' argument. The entire argument on behalf of the complainants overlooks the fact that there is no legal compulsion on the part of the complainant to enter into the kosher meat field at all. The complainants have voluntarily undertaken to sell their products as kosher meat and according to their own allegations have built up a large business on the faith of their customers that the meats which they sell as kosher really are kosher. It is well within the power of the Legislature to provide that if they make this representation, they must be held responsible for its correctness.*

The claim made by the complainants that the statutes are impracticable of enforcement is pecu-

liarly the kind of claim that can best be determined upon a specific record, and not upon a consideration of all of the hypothetical and speculative difficulties which the ingenuity of counsel may conjure up. The complainants have not shown that in any particular instance they have really had actual difficulty in determining whether a product sold by them was kosher or not. At the risk of repetition, we refer the Court again to the numerous cases which hold that in suits of this character, the Court will not consider hypothetical or conjectural difficulties, but will confine itself to the record before it, and rule that the complainants are entitled to equitable relief only if they can show that they have actually suffered from the supposed difficulty of which they complain (*Hendrick* v. *Maryland,* 235 U. S., 610, 621; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S., 531, and other cases cited *supra,* Point III), and that "the Court must deal with the case in hand and not with imaginary ones" (*Yazoo & Mississippi R. R.* v. *Jackson Vinegar Co.,* 226 U. S., 217, 219).

The language of CARDOZO, J., writing for the unanimous Court of Appeals of New York in the *Matter of State Industrial Commission,* 224 N. Y., 13, 17-18, is peculiarly relevant to the situation at bar:

> "The record now before us supplies a pointed illustration of the need that the judicial function be kept within its ancient bounds. Some of the arguments addressed to us in criticism of the resolution apply to all awards for death benefits; others to awards, made before June, 1916; others to awards where one of the dependents is a

> widow. It is thus conceivable that the proposed resolution may be valid as to some carriers and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises."

In the *Atlas* case, the highest Court of New York *was* presented with a definite record from which it was possible to tell in concrete form whether or not there was any merit to the objections urged by the complainant there against the practicability of the statute. The Court of Appeals ruled that there was no merit to those objections. This ruling might have been brought to this Court for review by writ of error. The writ of error was not taken. The parties affected by the statute preferred to ask a ruling on a record allowing free play to the ingenuity and imagination of their counsel. This Court has uniformly held that the solemn enactment of the legislative branch of a sovereign government cannot be so invalidated.

CONCLUSION.

The judgments of the District Court should be affirmed.

Dated, November 10th, 1924.

Respectfully submitted,

SAMUEL H. HOFSTADTER,
Special Deputy Attorney General,
Solicitor for the appellee Carl Sherman, as Attorney General of the State of New York.

H. H. NORDLINGER,
With him on the brief.

Argued by
FELIX C. BENVENGA.

Supreme Court of the United States,

OCTOBER TERM, 1923.

Nos. 403, 404 and 405.

HYGRADE PROVISION CO., INC., E. GREENBAUM CO., INC., and GUCKENHEIMER & HESS, INC.,
Appellants,
against
CARL SHERMAN, as Attorney General of the State of New York, and JOAB H. BANTON, as District Attorney of the County of New York,
Appellees.
No. 403. 104

LEWIS & FOX COMPANY,
Appellant,
against
THE SAME,
Appellees.
No. 404. 105

HARRY SATZ,
Appellant,
against
THE SAME,
Appellees.
No. 405. 106

BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

FELIX C. BENVENGA,
Solicitor for Appellee, Joab H. Banton, as District Attorney, etc.

FELIX C. BENVENGA,
CHARLES HENRY,
Of Counsel.

November, 1924.

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HARRY SATZ, Appellant, *against* THE SAME, Appellees.	No. 405.

BRIEF FOR APPELLEE, JOAB H. BANTON, AS DISTRICT ATTORNEY, &c.

Statement.

These appeals are from decrees and orders of the District Court of the United States for the Southern District of New York, unanimously de-

nying motions for preliminary injunctions and dismissing bills in equity. The Court was constituted of three judges, under the provisions of §266 of the Federal Judicial Code.

Introductory.

The complainants brought the bills in equity to restrain the District Attorney of the County of New York and the Attorney General of the State of New York from enforcing the penal provisions of §435, subd. 4, and §435-a of the Penal Law of the State of New York, upon the ground that the statutes are unconstitutional, in that they: (1) deny the complainants the equal protection of the law; (2) deprive the complainants of liberty or property or rights of property without due process of law; and (3) interfere unwarrantably with interstate commerce.

We contend: (1) that equity should not enjoin the enforcement of the statute, because the complainants have a plain, adequate and complete remedy at law; and (2) assuming that the complainants are without an adequate remedy at law, that the statute is, in all respects, valid and constitutional.

In denying the motions for preliminary injunctions and dismissing the bills, the District Court handed down a well-considered opinion, which will be found at pages 28-33 of Record No. 403, to which opinion we respectfully refer the Court.

We have deemed it unnecessary to offer a more complete statement of the case, but beg leave to refer to the statement in the Attorney General's Brief.

The Statutes Involved.

The statutes against which the injunctions are sought are embodied in the New York Penal Law as §435, subd. 4, and §435-a, and read as follows:

"§435. False labels and misrepresentations in the sale of food products.

A person who, with intent to defraud:

1. * * * * * *

2. * * * * * *

3. * * * * * *

4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here', or who exposes for sale in any window or place of business both kosher and nonkosher meat or meat products, who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be.

Is guilty of a misdemeanor."

"§435-a. Sale of kosher meat and meat preparations.

A person who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business, both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor."

Penal Law **§435**, subd. 4, was originally enacted by Chap. 233 of the Laws of 1915, and was amended by Chap. 581 of the Laws of 1922.

Penal Law **§435-a** was enacted by Chap. 580 of the Laws of 1922.

Penal Law **§435**, subd. 4, after its original enactment and prior to the amendment of 1922 was held to be constitutional by the Appellate Divi-

sion of the New York Supreme Court, First Department, and by the New York Court of Appeals (*People* v. *Atlas*, 183 App. Div. 595; 230 N. Y. 629). So far as material, the statute then provided that:

> "A person, who, with intent to defraud, * * * sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed therein the word 'kosher' in any language, is guilty of a misdemeanor."

POINT I.

The complainants have a plain, adequate and complete remedy at law.

It is now well established that, under certain circumstances, the Federal Courts will enjoin the enforcement of an unconstitutional State statute. For a long time, it was doubted whether they had this power; and, even now, though it is established that the power exists, there are certain very considerable and definite limitations upon its exercise.

1. Equity will not enjoin the enforcement of a criminal statute duly enacted by a State, unless: (1) the complainant's property rights will be ir-

reparably damaged by the prospect of a criminal prosecution, whether he be found innocent or guilty, and (2) the statute appears unconstitutional with reasonable certainty.

This Court "has often expressed its reluctance to adjudge a State statute to be in conflict with the Constitution of the State before that question has been considered by the State tribunals—to which it properly belongs—unless the case imperatively demands such a decision" (*Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 305; citing *Pelton* v. *National Bank*, 101 U. S. 143, 144; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245, 291).

> "Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunal prevented or anticipated unless the necessity for either be demonstrated" (*Grand Trunk R. R. Co.* v. *Michigan R. R. Com.*, 231 U. S. 457, 465-466).

In *Ex parte Young* (209 U. S. 123, 166, 167), this Court said:

> "No injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be followed by all the judges of the Federal courts."

In *Cruikshank* v. *Bidwell* (176 U. S. 73, 80), the Court said:

> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against the proceedings in compliance therewith but it must

> appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction."

In *Cavanaugh* v. *Looney* (248 U. S. 450, 456), this Court said:

> "But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young, supra,* 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable."

The complainant must show that the statute is unconstitutional; that the injunction is essential to the safeguarding of property rights (*Traux* v. *Raich,* 239 U. S. 33, 38); and that a plain, adequate and complete remedy may not be had at law (Judicial Code, §267).

The statute as to adequate remedy "certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the court" (*Cruikshank* v. *Bidwell,* 176 U. S. 73, 81, quoting *New York Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205, 214).

2. It is our contention that the so-called Kosher Meat Laws are constitutional as an exercise of the State's police power; and that, even if they are not, the complainants are not entitled to an injunction, because they have a plain, adequate and complete remedy at law. Should the complain-

ants be indicted, they would be at liberty to test the constitutionality of the statutes by a writ of *habeas corpus*, or by interposing unconstitutionality as a defense to the criminal proceedings. The question whether the statute is a valid exercise of the State's police power is one that can as well be tried and determined in a court of law as in a court of equity. No question of fact would be involved to determine the constitutionality of the statutes. Indeed, it would seem preferable that their validity be determined by a court having power to punish those guilty of violating them rather than by a court of equity.

It would not, perhaps, be beside the point to remind the Court that, for a long time, the remedy by injunction against the enforcement of a State statute was deemed an action against the State itself and, hence, not permissible. There is good reason to believe that the late MR. JUSTICE HARLAN was never dissuaded of this viewpoint (*Fitts* v. *McGhee*, 172 U. S. 516). While we concede that it is no longer open to us to urge this objection to the complainants' bill, nevertheless we do submit such Federal jurisdiction as exists for this purpose is of a delicate character and ought not to be extended beyond necessary protection against indubitable injury to property rights.

The case at bar is clearly distinguishable from *Ex parte Young* (209 U. S. 123). In that case, the State undertook to fix certain rates which a railroad might charge for its services and rendered any charge in excess thereof a separate and distinct crime punishable by heavy and infamous penalty. Even though satisfied that the unconsti-

tutionality of the statutes would be a sufficient and successful defense to a criminal prosecution, the complainants were not at liberty to await that occasion to obtain relief. Assuming the rates established by the statute to have been confiscatory, it was incumbent upon the railroad to abide by those rates or obtain servants who were willing to violate the statutes of their State and risk a long term of penal servitude and an extravagant fine. This Court said:

> "It would not be wonderful if under such circumstances there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk."

The Court then went on to show that the question of the guilt of each agent could be adjudicated only by a long and complicated inquiry into the reasonableness of the rates fixed by the State—a task obviously difficult for a jury.

In the case at bar, there are no questions of fact to be considered in connection with the determination of the validity of the statutes, nor any difficulty on the part of the complainants in securing necessary agents because, as we shall show, the statute requires an *intent to defraud* to render one violating it guilty.

Furthermore, no rights of the complainant are endangered by the prospect of prosecution under these statutes. Assuming them to be unconstitutional, no conviction can be had thereunder but by a proof of a defendant's intent to defraud, and the punishment of those found guilty is not enormous within the meaning of the rule laid down in

Ex parte Young (*supra*). A violation of the statutes herein involved is a misdemeanor and the punishment therefor is imprisonment for not more than one year or a fine of not more than $500 (N. Y. Penal Law, §1937).

The case of *Rast* v. *Van Deman* (240 U. S. 342) is directly in point. There, this Court passed upon the validity of a statute of the State of Florida requiring merchants in certain designated classes to pay prescribed license taxes, and providing that any person violating any provision of the statute should, on conviction, be punished by fine not exceeding $1000, or by imprisonment in the County Jail not exceeding six months. In the course of its opinion, this Court said (at p. 368):

> "The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young*, 209 U. S. 123, is not justified."

Inasmuch as the statute attacked in the instant case merely punishes those who misrepresent the quality of the meat they sell with deliberate fraudulent intent, there is no basis for the contention that it intimidates innocent persons from going to trial under it, and is analagous to *Rast* v. *Van Deman* rather than to *Ex parte Young*.

The cases of *Truax* v. *Raich* (219 Fed. 273), and *Marcus Brown Holding Co.* v. *Feldman* (269 Fed. 306), are distinguishable on the above grounds, and also because, under the statutes there assailed, the complainants would not have been a

party to the criminal prosecution expected to be brought thereunder, and would have lost their property rights without opportunity to be heard.

3. The complainants allege that they are selling meat which they honestly and reasonably believe to be kosher, but fear that, under these statutes, they will be prosecuted and convicted because, in some instance, a mistake has been made or the jury has been led so to believe. As we shall show at a later point, the statute plainly requires an intent to defraud. The complainants affect so to misunderstand the provisions of the law as to attribute the same preposterous misunderstanding to the District Attorney and ask protection against the effects of his imaginary error.

If the Court agrees that the statute requires an intent to defraud, then the complainants are demanding an injunction against anticipated unlawful and unauthorized conduct of the District Attorney. We have not found any case where an injunction was granted against a prosecuting officer who, it was alleged, was about to damage the complainant without any warrant of law. In no case has a complainant obtained relief where he had not the grace to admit that he was violating the statute, unconstitutional though it was. The complainants seek protection against a law which they pretend is invalid, but they lack the candor to admit they are violating it, except under a tortured and unnatural construction original with themselves.

We respectfully submit that, if the complainants' bill does not affirmatively show that they

are violating the statute according to the Court's understanding of the latter, then no relief can be given them. Indeed, if they are not guilty of any wrongdoing no relief is necessary, and the ordinary course of criminal procedure will establish their innocence.

The question whether the complainants' understanding of the statute or the District Attorney's understanding of the same is correct concerns the question of the guilt or innocence of the complainants. It has nothing to do with the constitutionality of the statute and it ought to be determined by a tribunal which can punish the complainants, should it be found that, in fact, they have violated the statute, reasonably construed.

4. Two cases which we now discuss make clear the position of the District Attorney on this question.

The case of *Jacob Hoffman Brewing Co.* v. *McElligott* (259 Fed. 525) was an action to enjoin the United States Attorney from enforcing the war-time prohibition act, which the United States Attorney had erroneously supposed to include the complainant's product. The Court declined to grant an injunction against the United States Attorney on the ground that he was misconstruing the statute, because that was really the same question as to whether the complainant was violating it and, hence, could far better be determined in ordinary criminal proceedings. The Court, quoting with approval from *Arbuckle* v. *Blackburn* (113 Fed. 616), said [at p. 625]:

> "We are now dealing with an officer of a state, proceeding under a valid law of the

> state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority."

JUDGE ROGERS, in The *McElligott* case (*supra*), took pains to write an elaborate opinion, in which he showed how very circumscribed was the jurisdiction of equity to enjoin a criminal prosecution, requiring both an unconstitutional statute and an impending property loss in defending the criminal action.

In *Post Printing & Publishing Co.* v. *Brewster* (246 Fed. 321), the State of Kansas passed some anti-cigarette laws which prohibited even the advertisement of cigarettes. The plaintiff, publishing a paper without the State which circulated within it, sought to restrain the enforcement of the ordinance against it, claiming that did not come within the meaning and intent of the act. As to this contention, the Court said [at p.324]:

> "It is quite probable, this well-meant, even if misguided, legislation is within the constitutional power of the state in the exercise of its reserve police powers; and further,

> if this view of the act be not sound, and the act of printing or publishing a newspaper containing the unlawful and prohibited advertisement of cigarettes is not within the meaning and intent of the act, as is by the plaintiff contended, then I agree with the contention of defendants that they may not be restrained and enjoined from attempting the enforcement of a valid law merely on the ground its prohibitive provisions do not include the plaintiff and its employes, for, in such event, there is abundant time and ample opportunity to establish this fact in defense of the criminal prosecution. *Ex parte Ayers*, 123 U. S. 443; *Fitts* v. *McGhee*, 172 U. S. 516; *Davis Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Truax* v. *Raich*, 239 U. S. 33."

We respectfully submit that the complainants have a plain, adequate and complete remedy at law and, therefore, are not entitled to injunctive relief.

POINT II.

The statutes are a proper exercise of the police power of the State.

It would be useless at this late date to attempt to summarize the decisions relating to the police power of the State. There can be no doubt, however, that the prevention of fraud is one of the primary objects to which the exercise of the police power may be directed. Vague and extensive as are the many branches of human conduct to which the State's police power may be extended, the

prevention of fraud, cheating and imposition and the maintenance of good morals among our citizens, are within the most conservative definitions of the police power which could possibly be formulated.

That is the purpose and the obvious purpose of these statutes. They are intended to prevent certain frauds which the Legislature believes threatening to the public, and apply to a class of persons having peculiar facilities for the perpetration of certain impositions.

We think also that it is possible to lay down, as an elementary principle, without entering the field of controversy, that, if the statute is intended to prevent fraud, it is a valid exercise of the police power, provided it tends reasonably to effect that end.

1. There are but two elements to the constitutionality of a statute enacted under the police power: (1) Its object must be one within the police power,—in this case the prevention and punishment of fraud; and (2) its provisions must be reasonably calculated to reach the evil to which the Legislature has addressed itself.

The first of these requirements appears satisfied upon a mere inspection of the statute. The other is hardly less clearly met, as the law simply makes it a crime for a person fraudulently to sell unbranded meat.

The constitutionality of these statutes, in substantially their present form, has been upheld by the Court of Appeals of the State of New York

in *People* v. *Atlas* (230 N. Y. 629; affg. 183 App. Div. 595). The amendments of 1922 are of such a nature that the decision in the *Atlas* case is fully applicable to them.

We are confident that, after this adjudication by the highest court of our State, the Supreme Court will be loath to deny the constitutionality of these statutes.

In *Halter* v. *Nebraska* (205 U. S. 34), it is said [at p. 40]:

> "In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or State, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore, each state, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

In *Powell* v. *Pennsylvania* (127 U. S. 678), it is said [at p. 683]:

> "It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with

> that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler* v. *Kansas,* 123 U. S. 663; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 751; *Barbier* v. *Connolly,* 113 U. S. 27; *Yick Wo* v. *Hopkins,* 118 U. S. 356."

We will not impose upon the patience of the Court with an elaborate treatise upon the nature and boundaries of the police power. It will suffice to call attention to a few recent decisions upholding State statutes which seem to us to go much further than is necessary in this case. When we regard the holdings in these cases, we are confident that the Court will not render nugatory the act of our Legislature in the present case.

The States have power to enact statutes requiring various products sold therein to be labeled with the exact percentages of the different ingredients composing each.

> *Savage* v. *Jones,* 225 U. S. 501 (animal foodstuffs).
>
> *Corn Products Refg. Co.* v. *Eddy,* 249 U. S. 427 (syrups).
>
> *Sligh* v. *Kirkwood,* 237 U. S. 52 (citrus fruits).
>
> *Hebe Co.* v. *Shaw,* 248 U. S. 297 (condensed milk).

In *Armour & Co.* v. *North Dakota* (240 U. S. 510), a State statute was sustained that forbade

the sale of lard, except in packages containing 1, 3 and 5 pounds, or multiples thereof. The Supreme Court could not say that such a statute was not reasonably directed at a genuine evil. Accordingly, it was held a valid exercise of the State's police power.

In *Hutchinson Ice Cream Co.* v. *Iowa* (242 U. S. 153), State statutes forbidding the sale of ice cream containing less than a prescribed percentage of butterfat were upheld as a valid exercise of the police power.

In *Noble State Bank* v. *Haskell* (219 U. S. 104), it was held a valid exercise of the police power for a State to pass a statute requiring banks to contribute to a fund to make good any loss to depositors upon the failure of a bank.

In *Green* v. *Frazier* (253 U. S. 233), the State of North Dakota levied taxes to raise funds to enable it to go into the business of manufacturing and marketing farm products, establishing warehouses, elevators, flour mills, building homes for residents. These projects were held to be within the police power of the state and not violative of the Federal Constitution.

In *Royal Baking Powder Co.* v. *Emerson* (270 Fed. 429, 435), it was said:

> "It may be added that, where the State law is not in conflict with the national act, a broad latitude is allowed states in protecting their citizens from adulterated or misbranded articles." (Citing *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Corn Products Co.* v. *Eddy*, 249 U. S 427.)

In *Corvallis Creamery Co.* v. *Van Winkle* (274 Fed. 454), the State of Oregon enacted a penal statute rendering it a crime for any concern dealing in a substitute for butter, milk, or cheese to use as a part of its name or the name of its products the words, "milk", "butter", "cream", "cheese", "dairy", etc. The Court refused to enjoin the enforcement of this statute, declaring it a valid exercise of the police power.

In *Adams* v. *Milwaukee* (228 U. S. 572), an ordinance, forbidding milk to be brought into the city, unless from cows which had sustained a certain tuberculin test, was held valid.

2. It is apparent from these authorities and from reflection that a valid police statute need not be, and seldom can be, *entirely* free from the objections that it restrains the liberty of citizens, takes property without due process of law, denies the equal protection of the laws, and interferes somewhat with interstate commerce. The point is that these defects are trivial and slight when compared to the benefits to the public which flow from the statutes.

For example, prior to the passage of the Eighteenth Amendment, States were allowed entirely to prohibit any manufacture of or traffic in intoxicating liquors (*Mugler* v. *Kansas*, 123 U. S. 623; *Boston Beer Co.* v. *Mass.*, 99 U. S. 25; *Foster* v. *Kansas*, 112 U. S. 201). No doubt these statutes impaired, if they did not destroy, the property of those engaged in the manufacture of spirits. They restrained the liberty of such persons and, to that extent, might be considered as denying them the equal protection of the laws.

It was held, however, and subsequent events have given no reason to doubt the wisdom of the holding, that a State might inflict these hardships to a slight degree for a great public benefit to the mass of citizens.

That we contend is the present case. Indeed, the objections to the New York Kosher Meat statutes are much more technical and unsubstantial than those which might fairly have been made in many of the cases we have cited.

3. The denial of the equal protection of the laws is especially strained. The legislature in regulating the conduct of a business, in the exercise of its police power, has a wide discretion with respect to the selection and classification of the business to be regulated. It ought to be assumed, in the absence of clear proof to the contrary, that the Legislature, in adopting the particular classification it did, had information which justified that action. Where the classification is not unreasonable in itself and the law operates equally upon all persons coming within the class selected, the Courts have not been willing to substitute their judgment for that of the Legislature as to the wisdom or justice of the classification made.

The case of *Lindley* v. *Natural Carbonic Gas Co.* (220 U. S. 61), contains some remarks upon this topic which we believe dispose of this point (see pp. 78-79).

In *Adams* v. *Milwaukee* (228 U. S. 572), a distinction between milk produced within and that without the city was sustained as not denying the equal protection of the laws.

In a recent case against these very defendants (*Packard* v. *Banton*, 264 U. S. 140), this Court recognizes as reasonable a distinction between those who operate automobiles for public hire and those who operate them for private use.

In view of these decisions we submit that the Legislature had full power to single out dealers in kosher meat products and declare those dealers should not, with intent to defraud, make any false representations in regard to the kosher character of the products sold or offered for sale by them. The classification is not unreasonable, and those dealers have peculiar opportunities for committing fraud (which, in the opinion of the Legislature, have not, apparently, been neglected), and the statutes operate equally upon all dealers coming within the class singled out by the Legislature for legislation.

4. The objection that the statutes are unconstitutional because they have been enacted in behalf of a limited class of the community—namely, those desiring to buy kosher meat—is entirely without merit.

The statutes are intended to and aptly calculated to protect an unlimited number of purchasers who desire or may desire to buy kosher meat. It makes no difference whether such persons are Gentiles or orthodox Jews. The statutes do not limit the sale of kosher meat to the one or deny it to the other. No one is deprived of the right to sell kosher meat and call it such, but all persons are prohibited from knowingly offering

non-kosher meat for sale as kosher, and thereby perperate a fraud upon the public.

There may be room for an honest difference of opinion as to whether the Legislature should enter this field of activity, but that question was one for the Legislature to determine and its determination cannot be reviewed by the Courts.

5. The objection that the statues are a violation of due process of law merit but brief discussion. The State has the right, by virtue of its police power, to render it criminal for any person to make false representations with intent to defraud in respect to the character of food products offered for sale to the general public. If the profits to certain persons are injured by statutes requiring fair and honest dealing, the reflection is less on the statutes than upon those who sustain such injury. No one can be deprived of his liberty by virtue of these statutes, unless a jury has found beyond a reasonable doubt that he sold products as kosher meat knowing them not to be such. The statutes do, indeed, require dealers to provide themselves with certain signs, thereby putting them to a slight expense. This deprivation of property, however, we deem so trifling as to have no weight, as compared with the important and necessary benefits which the Legislature has attempted to confer upon the public.

We respectfully submit, therefore, that the statutes are a proper exercise of the police power of the State and valid and constitutional.

POINT III.

The statutes require both a definite act and a specific intent to defraud.

A great portion of the complainants' argument is devoted to the contention that the word "kosher" is not adequately defined in the statute, nor in the religious requirements therein referred to. By attempting to disbelieve that an intent to defraud is required and by exaggerating whatever vagueness does, in fact, exist, the complainants have conjured up a picture of innocent, well-meaning persons, with a sincere belief in the kosher quality of the products offered for sale, being ruthlessly jailed merely because of a divergence from the judgment expressed by a jury. In connection with the complainants' insistent claims that no intent to defraud is necessary, this difficulty in definitely establishing the kosher quality of a given product is made to appear somewhat impressive. Upon analysis, however, it is perfectly apparent that an intent to defraud is required by the statute, and it also is apparent that whether certain meat is kosher or not is a question which, with the exception of a negligible number of cases, is fairly easy of determination.

When these two branches of the complainants' argument are considered separately they lose all the persuasiveness which they had when skilfully blended together.

1. Penal Law §435, subd. 4, and Penal Law §435-a are almost identical—a fact which we were

anxious to impress upon the Court when calling attention to the case of *People* v. *Atlas* (*supra*), where the Court of Appeals held the former law constitutional. The substantial similarity of the statutes has given the appellants a chance to argue, or, at least, to assert, that §435-a must have been enacted deliberately to dispense with the necessity for an intent to defraud; otherwise, it is said, the section would be unnecessary and repetitious. We do not feel called upon to demonstrate the similarity or dissimilarity of the statutes in question. That fact is immaterial. The important fact is that an intent to defraud is an element of the offense defined in both Statutes. It is hardly likely that, if the intent of the Legislature in passing §435-a was to abolish, as an element of a certain crime, the intent to defraud, it would have embodied, in the first half dozen words, the phrase "with intent to defraud." Without pursuing the subject further, we feel confident that the Court will not attribute to our Legislature a policy of enacting statutes which mean the precise opposite of what they say.

2. It is the more certain that an intent to defraud is still an element of the crime when it is considered that a contrary interpretation would render the law harsh and oppressive. To that extent, we are glad to agree with the complainants. It is still the law in New York that a penal statute is to be construed, wherever any ambiguity occurs, in favor of the person charged with violating it. This does not mean, of course, that the Court will distort the plain language of the Legislature so as to prevent its application to those for

whom it was intended. As recently as *People* v. *Santoro* (229 N. Y. 277), the Court of Appeals said [at p. 281]:

> "It is always presumed, in regard to a statute, that no unjust or unreasonable effect was intended by the Legislature. The statute, unless the language forbids, must be given an interpretation and application consonant with the presumption."

And in *People* v. *Hewson* (224 N. Y. 136), the Court said [at p. 138]:

> "The statute is penal; its violation is a crime. We may not amplify it by construction" (citing cases).

Referring to the principles we have attempted to state, the Court, in *Gibbs* v. *Arras Brothers* (222 N. Y. 332), said [at p. 335]:

> "By virtue of those rules the statute must be strictly construed for the reasons that it imposes restrictions upon the control or management of private property by the owner and is both penal and criminal. Its effect is not to be extended through implication or analogy."

3. The suggestion is made by the complainants that, inasmuch as the phrase, "with intent to defraud", occurs in the early part of Penal Law §435-a and several semicolons occur thereafter, the phrase does not have any effect, except in that part of the statute prior to the first semicolon.

In other words, the act of selling or exposing any meat falsely represented to be kosher is a crime only in case there exists an intent to de-

fraud. But the other acts mentioned in the statute, such as falsely representing any food product or package to be kosher or selling and exposing kosher and non-kosher meat in the same store without so advertising or exposing such meat in any window or without signs reading kosher or non-kosher, as the case may be, are crimes whether there is any intent to defraud or not.

So to construe the statute attributes to the Legislature an utterly arbitrary and baseless distinction between acts of a similar nature and character having substantially identical effects. No one can suggest any reason whatever for the requirement that a sale must be made with intent to defraud in order to constitute a crime, and yet the mere incorrect representation of the contents of a package is a crime without any intent to defraud. If necessary, no doubt, the Courts would go out of their way to avoid so construing the statute. In this case, however, no violence need be done to the language employed by the Legislature in order to reach this result. It is perfectly apparent that the words "a person who with intent to defraud" should be understood as the subject of each and every verb in the entire section. There is nothing which militates against this construction, except the presence of the semicolons in the sections.

It cannot be doubted, however, that the pronoun "who" is the subject of all the verbs in that section, and as it is immediately followed in the first line with the phrase "with intent to defraud", that phrase must modify all the acts specified by the Legislature.

It is not our desire to ask the Court to disregard any of the ordinary marks of punctuation or to interpret the section otherwise than according to the ordinary rules of syntax. It is not necessary. But, even if it were, there is no doubt that the Court would be justified in doing so, in order to avoid the preposterous construction proclaimed by the complainants.

In *Chicago, etc. R. R. Co.* v. *Voelker* (129 Fed. 522, 527), the Court said:

> "Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." (Citing *Hammock* v. *Loan Trust Co.*, 105 U. S. 77-84; *United States* v. *Lacher*, 134 *id.* 624; *United States* v. *Oregon R. R. Co.*, 164 *id.* 526; *Stephens* v. *Cherokee Nation*, 174 *id.* 445.)

In *Matter of Olmsted* (17 Abb. N. C. 321), the Court, discussing a statute, said:

> "If the semicolon, whose office is to distinguish the conjunct members of a sentence, were dispensed with, and a comma substituted in its place, we should have a clearer conception of the meaning of the sentence (*Matter of Hawley*, 100 N. Y. 206). Courts will, if needful, disregard punctuation in construing statutes."

4. The position assumed by the complainants in contending that the word "kosher" has no definite significance and is so vague as to render it dangerous for them to signify their products as kosher on penalty of imprisonment should they

prove incorrect, we believe largely affected and disingenuous. On the one hand, they claim they will be divested of vast property interests by refraining from continuing to designate the goods which they sell as kosher. On the other hand, the word is so destitute of definite meaning that they honestly cannot find out whether the goods are kosher or not. On the one hand, the word "kosher" has little or no definite meaning. On the other hand, if they are required to label certain of their goods as non-kosher, the goods are thereby stigmatized because "non-kosher" has a definite, unfavorable meaning. We are not able to follow the linguistic psychology by which a certain adjective is meaningless, but the same adjective with a negative prefix is so opprobrious as to entail a great pecuniary loss upon those required to apply it to their goods.

It is difficult to have patience with the attitude assumed by the complainants in this respect. They have built up vast business organizations based upon the desire of a large portion of the citizens to buy kosher meat. When they are required to deal honestly with persons having that perfectly lawful desire, they suddenly discover that there is no such thing as kosher. When they are required to inform prospective purchasers, under certain circumstances, of the non-kosher quality of the products exposed for sale they bewail that their goods are being stigmatized and rendered valueless. If there is anyone who ought to be familiar with the nature and quality of kosher products, it certainly is one who has derived a vast revenue from preparing and market-

ing such products over a term of years on the representation that they are strictly kosher.

No one is required under these statutes to engage or refrain from engaging in the business of purveying kosher products. If any person desires, however, to embark in this business, he must not sell as kosher goods which he knows are not such; and, under certain circumstances, deemed by the Legislature likely to facilitate fraud, he must inform buyers of the non-kosher quality of the goods displayed. Surely, there is nothing in such moderate and reasonable requirements that demands an injunction against their enforcement, in order to prevent hardship too extreme for the ordinary processes of the criminal law.

The Court is confronted with a request that it adjudge words used by the Legislature of the State of New York to be unintelligible as a guide of conduct to the citizens of New York. We respectfully submit that the members of the New York Legislature are much more favorably situated to find out what meaning is given to words by the citizens of that State than this Court. They may be presumed to be in communication with their constituents, to be accustomed to address speeches to them and to hold ordinary conversations in connection with the legislative needs of the people. They must know what words are understood by those whom they represent and what expressions pass current among them. It must be a most extreme case where this Court can confidently pronounce that the Legislature of the State of New York, in describing the elements

of a crime, has used words so vague and indefinite as to render its act null and void.

There is no such difficulty in the instant case.

In *People* v. *Atlas* (*supra*), the Court of Appeals gave no weight to the objection that the statute was too vague to be understood.

5. Affidavits were submitted on behalf of the defendants in the District Court in the case at bar which conclusively discountenance the pretended difficulty of which the complainants complain.

The word "kosher" is to be found in any English dictionary.

In the Encyclopedia Britannica, the editors have clearly and succinctly defined it in a space approximately equal to one page of this brief. It does not appear that the editors of that publication, when they were confronted with the task, gave themselves up to dispair as the complainants profess they will have to do.

There is an affidavit in the record of Moses Hyamson, a very eminent Jewish divine, Professor of Codes of the Jewish Theological Seminary of America, formerly, for eleven years, Chief Judge of the Ecclesiastical and Arbitration Court of London, England, and at one time the Chief Hebrew Ecclesiastical officer of the British Empire and author of various works on Jewish law. This learned man, in an affidavit, sets forth the rules of slaughtering in the space of a very few hundred words—an exposition, we may remark,

not without great interest. He says, near the end of his affidavit:

> "The foregoing is a brief but complete summary of the entire law pertaining to kosher meat and meat preparations."

There is another affidavit by one ELIAS A. COHEN, a prominent Jewish layman of New York, which affidavit sets forth a certain conference of learned Rabbis held on the 29th day of January, 1923. Scores of Rabbis were present at this meeting and their names are duly set forth in the affidavit. The following resolution was unanimously adopted:

> "RESOLVED: That it is the unanimous sense of all those assembled here, representatives of various Rabbinical Colleges and Synods who are interested in the question of kosher, that the Law of Kashruth relative to meat or meat preparations is clear, simple and distinct, and that the laws appertaining thereto are easily ascertainable in the Jewish Code applying thereto."

It thus appears that, at present, there is no doubt among orthodox Jews as to what constitutes kosher. Attempts on the part of the complainants to resuscitate controversy and schisms with reference to this question which occurred during the dark ages are curious rather than useful.

BERNARD DRACHMAN, on whose testimony given in another case the complainants relied in the Court below, swears:

> "That the term kosher is a perfectly clear and definite one in Jewish usage; that the

> questions treated in the Responsa concern only exceptional or border line cases, are in many instances repetitious and constitute only an infinitesimal part of the cases where the law of kosher operates, and that meat and meat products are kosher when prepared in accordance with the settled laws codified in the Rabbinical Code known as Shulchan Aruch."

There are several other affidavits in the record from dignitaries equally high in the orthodox Hebrew church, proving, without exception, the clear, simple and distinct nature of the requirements as to kosher meat.

6. The probability that, in some isolated case, the complainants may make a mistake in judgment and be liable to criminal prosecution therefor, even if true, would not be proof of the unconstitutionality of these statutes. There is ample authority for criminal liability under those circumstances.

In *Nash* v. *United States* (229 U. S. 373), a prosecution under the Sherman Act, MR. JUSTICE HOLMES, writing for the Court, said [at pp. 376-377]:

> "It is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable; there must be some definite-

> ness and certainty' is cited from the late MR. JUSTICE BREWER sitting in the Circuit Court. (*Tozer* v. *United States*, 52 Fed. Rep. 917, 919.) But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

The Court then gave many illustrations and citations sustaining these remarks, utterly discountenancing the contention that a mere error of judgment could not, under the Constitution, amount to a crime.

Other cases have upheld statutes which seem to us substantially less clear and explicit than those with which the Court is now concerned.

It would be useless to attempt to digest all of the authorities to be met with on this subject, but, as we did in considering the extent of the police power, it will suffice merely to mention a few typical instances.

In *Fox* v. *State of Washington* (236 U. S. 273), a state statute was upheld which rendered criminal "encouraging disrespect for law".

In *Ex parte Hayden* (12 Cal. App. 145), a statute was enforced which rendered it criminal for a confidence operator to be found loitering around a wharf, depot, or brokerage office, etc.

In *Comer* v. *United States* (213 Fed. 1), statutes against the mailing of obscene matter were

held valid, in spite of the indefinite standard to be observed.

We respectfully submit, therefore, that the statutes are sufficiently clear and definite, and require both a definite overt act and a specific intent to defraud.

IN CONCLUSION.

The decree and judgment of the District Court, denying the injunctions and dismissing the bills, should be affirmed.

Respectfully submitted,

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